

Supreme Court, U.S.

FILED

DEC 22 1977

MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1977

NO. 77-906

PATRICK M. SCHOTT and
JOAN G. SCHOTT,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
REVIEW A JUDGMENT OF THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

REUTER AND REUTER
Attorneys for Petitioner
1200 Oil and Gas Building
New Orleans, Louisiana 70112
(504) 581-2477

PATRICK M. SCHOTT
In Proper Person
421 Loyola Avenue
New Orleans, La., 70112
(504) 568-4713

INDEX

	PAGE NO.
Reference to Opinion of Courts Below	1
Statement of Jurisdictional Grounds.....	2
Questions Presented for Review	2
Statutes Involved.....	3
Statement of the Case	4
Basis for Federal Jurisdiction in Court of First Instance	5
Argument	5
Argument on Question 1.....	5
Argument on Question 2.....	8
Argument on Question 3.....	8
Argument on Question 4.....	9
Conclusion	10
Certificate of Service.....	12

INDEX (Continued)

	PAGE NO.
Per Curiam of United States Court of Appeals	A-1
Judgment of United States District Court	A-2
Reasons for Judgment of United States District Court	A-3

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

PATRICK M. SCHOTT and
JOAN G. SCHOTT

versus

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO REVIEW
A JUDGMENT OF THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REVIEW ON WRIT OF CERTIORARI

The petition of Patrick M. Schott¹ and Mrs. Joan G. Schott with respect represents that:

A.

This has reference to an unpublished opinion of the United States Court of Appeals for the Fifth Circuit in the case entitled "Patrick M. Schott and Mrs. Joan G. Schott vs. United States of America" docket No. 77-2044, copy of which is attached affirming a judgment of the United States District Court for the Eastern District of Louisiana for the reasons assigned by Honorable Alvin B. Rubin, copy of which is also attached.

1. Nominal plaintiffs are husband and wife who filed joint income tax return for 1972. For purposes of this petition, singular plaintiff denotes Patrick M. Schott, a judge of the Court of Appeal, Fourth Circuit, State of Louisiana.

B.

(i) Said judgment sought to be reviewed was entered on September 23, 1977.

(ii) No rehearing was applied for in the Court of Appeals.

(iii) Jurisdiction is believed to be conferred on this Court to review said judgment by the Constitution of the United States; Title 28, of the United States Code § 1254, (1); and Rule 19(1) (b) of the Supreme Court Rules.

C.

The questions presented for review are as follows:

1) Is the decision of this Court in *McDonald v. CIR*, 323 U.S. 57, 655 Ct. 96, 89 L.Ed. 68 (1944) still viable after the passage of 33 years of time and the occurrence of so many drastic changes in attitudes and philosophy?

2) Is the fundamental rationale of *McDonald* consistent with decisions of the Tax Court of the United States allowing deductions for income tax purposes of fees paid to employment counselors by corporate executives seeking a change in employment?

3) Is not the rationale of these employment counselor fee cases particularly applicable to the case of plaintiff whose basic profession was that of lawyer when he ran for the office of judge in an election?

4) Are the *McDonald* case and its progeny applicable in any way to the facts of this case?

D.

The statutes which this case involves are from the Internal Revenue Code of 1954 (26 U.S.C.) as follows:

"SEC. 162. TRADE OR BUSINESS EXPENSES

(a) *In General.* -- There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, ***

* * * *

"SEC. 212. EXPENSES FOR PRODUCTION OF INCOME

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year --

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax."

E.

STATEMENT OF THE CASE

This is a suit for refund of income taxes based upon the alleged deductibility of campaign expenses incurred by plaintiff in seeking election as a judge. Plaintiff claimed that the expenses were deductible under Section 162 of the Internal Revenue Code of 1954, as ordinary and necessary business expenses, or under Section 212 as ordinary and necessary expenses incurred for the production of income. The case was presented to the district court on cross motions for summary judgment, there being no dispute about the facts of the case. From a judgment of the district court granting the motion of defendant and denying the motion of plaintiffs, the latter have taken this appeal.

On September 20, 1972, plaintiff was elected Judge of the Court of Appeal, Fourth Circuit, State of Louisiana, and he took his oath of office on December 12. He was actively engaged in the practice of law until December 12, notwithstanding the fact that he had been engaged in an intensive time-consuming and prolonged campaign leading up to his election. The great bulk of plaintiff's income for the year 1972 came from his law practice. A great part of plaintiff's campaign expenditures were incurred in advertising. On their tax return for 1972 plaintiffs claimed as a deduction the unreimbursed campaign expenses he incurred in his election campaign. The expenses were disallowed as a deduction, an additional tax liability was assessed against plaintiffs and this was thereafter paid in full. Plaintiffs are seeking a refund of \$3,879.37 plus interest.

G.

The basis for jurisdiction over the case by the United States District Court was 28 U.S.C. § 1340, 1346 and 26 U.S.C. § 7422.

H.

ARGUMENT

Rule 19 provides that this Court will consider as a reason for granting a writ of certiorari the situation where the Court of Appeals 'has decided an important question of federal law which has not been, but should be, settled by this Court.' It is this standard on which plaintiffs rely for this Court to consider each of the questions presented for review.

1) Argument on Question 1

The law relied upon by the Court of Appeals in this case is not settled because the only authority from the Court on the subject is an obsolete, outdated, perhaps ancient, 1944 decision of this Court.

In 1946 this Court refused to declare an Illinois reapportionment statute unconstitutional, taking the position that plaintiff's remedy was to secure proper reapportionment from the state legislature. *Colgrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198. The prevailing attitude of the Court was best exemplified by one sentence: "Courts ought not to enter this political thicket." The obsolescence of the *Colgrove* case and its philosophy is obvious and need not be labored in this brief. Suffice it to say that today's courts

routinely take an active role in drafting and revising constitutions, charters, statutes and ordinances for state, county and municipal governments.

McDonald is a creature of the same age as *Colgrove*. Plaintiffs are asking that this Court re-examine *McDonald* in light of today's realities in considering whether it applies to the instant case and not simply accept *McDonald* as controlling in 1977 when it was written to deal with problems as they existed in 1944.

Judge McDonald spent some \$13,000 on his 1939 campaign when there was no television, and a first-class letter could be mailed for three cents. Plaintiff could produce only a modest television promotion for \$13,000 in 1972, and the cost of mailing a single item to all of the registered voters to whom he was appealing exceeded \$20,000. The realities of today required plaintiff to spend a large sum of money to wage a serious campaign for his office.

Congress, state legislatures, good government groups and the public are concerned about the ethical implications of campaign funding. Much legislation has resulted already and additional legislation will surely be forthcoming.

The concern is justified. The potential for corruption of public officials who must solicit contributions from individuals and groups to gain public office has been, and continues to be demonstrated. In Louisiana, where judges must enter into political campaigns of the same type as those entered into by candidates for legislative and executive offices, the specter of favoritism on the bench resulting from campaign contributions is a real and present danger to the integrity of the judiciary.

Plaintiff spent his own money running for his office and seeks only a modest incentive of being able to deduct his campaign expenses from his income tax for the year in which he ran. What rational basis is there for rejecting such a simple and straight forward method of encouraging candidates for judicial office to finance their own campaigns as opposed to soliciting contributions and becoming beholden to individuals and groups?

Judges are in a class apart from members of the executive and legislative branches of government. The latter may legitimately reward contributors by appointments to boards or commissions or they may legitimately favor legislation which is supported by their contributors. But a judge's duty is to decide cases fairly and justly without regard to personalities and regardless of personal prejudices. There should be an ironclad insulation of judges from influences by anyone, including campaign contributors.

There is another distinction between judges and other candidates in that the judicial candidate normally seeks the office with the idea of making the judiciary a lifetime career. If he spends a large sum he may think in terms of amortizing his expenses over his working lifetime. Other candidates normally run for a short period of time, retain outside interests and have the door open at all times to go into or continue with other fields of endeavor.

The obsolescence of *McDonald* is sufficient for this Court to grant a writ of certiorari. This Court should not permit a question of this importance to be treated without considering contemporary conditions and problems.

2) Argument on Question 2

The application of the *McDonald* case to plaintiff's is wholly inconsistent with prevailing decisions of the Tax Court of the United States. These decisions came long after *McDonald* and are being followed, but despite their logical application to plaintiff's case the Court of Appeals refused to apply them.

In *McDonald*, the Court found that plaintiff was in the trade, business or occupation of a judge but held that his campaign expenses were incurred, not in that trade, business or occupation but rather to become a judge for the following term. In *Primuth*, 54 T.C. 374, *Kenfield*, 54 T.C. 1197 and *Cremona*, 58 T.C. 20, the tax court considered the deductibility from income of fees paid by corporate executives to find new positions. The Court held that such fees were legitimate deductions under Section 162(e) of the Internal Revenue Code. It was of no moment to the tax court that these fees were incurred by the tax payers to become something in the future.

We submit that there is a basic, underlying contradiction here between *McDonald* and the tax court cases which has been ignored by the Court of Appeals. Surely this Court should settle this problem of inconsistency.

3) Argument on Question 3

The Court of Appeals ignored the facts of this case which provides a basis for distinction from *McDonald*.

One might attempt to explain the inconsistency between

McDonald and the cited tax court cases by the fact that Judge McDonald had already made a change in his position when he incurred his expenses, but your plaintiff is in the identical position as the corporate executives in the tax court cases.

Until 1972 plaintiff was a practicing attorney within his profession of one who possessed legal training and was licensed to practice law. Suppose he had employed a counselor or to find a position for him as a law professor or an in-house corporate attorney, why would not the fee be deductible? How could this be distinguished from the cases of the corporate executives? In the same way plaintiff incurred campaign expenses to change positions from practicing attorney to judge.

The *McDonald* case did not contain this ingredient. He was an incumbent judge who had already made the change.

4) Argument on Question 4

Because there is an iron clad argument for the application of the tax court decisions to plaintiff's case because of its peculiar and unique facts as distinguished from *McDonald*, under the law as interpreted by the Court of Appeals, plaintiffs are being discriminated against and are victims of gross injustice. The matter should be settled by this Court.

Plaintiff deducted his campaign expenses from income he derived principally as a practicing attorney in 1972. About 7% of his income in that year was derived from his salary as a judge, while the balance was derived from his law practice. There is no question that an attorney may deduct from his

income expenses which are customarily considered advertising expenses in other businesses and professions. By the exposure plaintiff received in his campaign from television, newspaper and other mass media as well as personal contacts with potential clients, plaintiff had the purpose of generating law business as well as promoting his candidacy.

The point is that in plaintiff's case it does not even matter that this was a political campaign. Plaintiff practiced law during and after the campaign. The exposure he received was directly related to the generation of law business on which fees were earned and taxes assessed in 1972. Even if plaintiff had lost his campaign the expenses would have been deductible on this basis.

Plaintiffs are not aware of any case where this issue has been raised and its presence makes *McDonald* inapplicable. Why should plaintiffs be given unequal treatment by the Courts of the United States in the interpretation of our income tax laws? We repeat -- *McDonald* is not the answer because its facts were different.

CONCLUSION

Petitioners pray that this Court grant a writ of certiorari to review the judgment of the Court of Appeals and in due course reverse that judgment, granting plaintiffs' motion for summary judgment and denying defendant's motion.

REUTER AND REUTER
 Attorneys for Petitioner
 1200 Oil and Gas Building
 New Orleans, Louisiana 70112
 581-2477

By: _____

PATRICK M. SCHOTT
 In proper person
 210 Civil Courts Building
 421 Loyola Avenue
 New Orleans, La. 70112
 568-4713

CERTIFICATE OF SERVICE

I certify that I have, pursuant to paragraphs 1 and 2a of Rule 33, served three copies of the foregoing petition each on counsel of record, Gerald J. Gallinghouse, United States Attorney, 500 Camp Street, New Orleans, La., 70130; Gilbert E. Andrews, Chief, Appellate Section, Tax Division, United States Department of Justice, Washington, D.C., 20530 and Solicitor General of the United States, Department of Justice, Washington, D.C., 20530, by mailing same to them air mail, postage prepaid.

New Orleans, Louisiana, December 21st, 1977.

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT
PUBLISH

NO. 77-2044
Summary Calendar*

PATRICK M. SCHOTT and
MRS. JOAN G. SCHOTT,

Plaintiffs-Appellants,
versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District
Court for the Eastern District of
Louisiana

(September 23, 1977)

Before AINSWORTH, MORGAN and GEE,
Circuit Judges.

PER CURIAM:

We agree with the opinion of the
district court. For the reasons stated
therein, its judgment is AFFIRMED.

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. vs. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

A-2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Mar 26, 1977

PATRICK M. SCHOTT and *
MRS. JOAN G. SCHOTT * CIVIL ACTION
versus *
NO. 76-2277
ROBERT M. CUTTS, *
DISTRICT DIRECTOR OF *
INTERNAL REVENUE *
SECTION "C"

JUDGMENT

The Court having previously granted
the motion of defendant for summary judgment,

IT IS ORDERED, ADJUDGED AND DECREED
that there be judgment in favor of defendant,
Robert M. Cutts, District Director
of Internal Revenue, and against plaintiffs,
Patrick M. Schott and Mrs. Joan
G. Schott, dismissing said plaintiffs'
suit, with costs.

Dated at New Orleans, Louisiana, this
25 day of March, 1977.

s/ Alvin B. Rubin
UNITED STATES DISTRICT JUDGE

J. Richard Reuter, Jr., Esq.
Leonard Avery, Esq.
William D. M. Holmes, Esq.

Date of Entry: Mar 28, 1977

A-3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Mar 25, 1977

PATRICK M. SCHOTT and *
MRS. JOAN G. SCHOTT * CIVIL ACTION
Plaintiffs *
versus *
NO. 76-2277
VERSUS *
* SECTION "C"
ROBERT M. CUTTS, *
DISTRICT DIRECTOR OF *
INTERNAL REVENUE *
Defendant *

J. Richard Reuter, Jr., Esq.,
Attorney for Plaintiffs

Leonard Avery
Attorney for Defendant

William D. M. Holmes
Attorney for Defendant

RUBIN, District Judge:

These cross motions for summary judgment raise the question whether campaign expenses incurred by Patrick M. Schott (plaintiff),¹ in seeking election as a judge, are deductible under Section 162 of the Internal Revenue

1. Joan G. Schott, the wife of Patrick Schott, who joined her husband in filing a joint income tax return for the year in issue, is also a plaintiff herein.

Code of 1954, 26 U.S.C. §162,² as ordinary and necessary business expenses, or under Section 212 of that Act, 26 U.S.C. §212,³ as ordinary and necessary expenses incurred for the production of income.

2. 26 U.S.C. §162, provides in relevant part:

(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business***.

3. 26 U.S.C. §212, provides in relevant part:

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year--

- (1) for the production or collection of income
- (2) for the management, conservation, or maintenance of property held for the production of income; or
- (3) in connection with the determination, collection, or refund of any tax.

On September 20, 1972, Patrick M. Schott was elected Judge of the Court of Appeals, Fourth Circuit, State of Louisiana. On their tax return for 1972, Judge Schott and his wife claimed as a deduction unreimbursed campaign expenses incurred in his election campaign. The Commissioner of Internal Revenue disallowed the deduction of these campaign expenses on the grounds that they were not deductible for income tax purposes as ordinary or necessary expenses incurred either in the carrying on of a trade or business or in the production of income. An additional tax liability was assessed against the plaintiffs, and thereafter paid in full.

This action was instituted to gain a refund of the sum paid, \$3,879.37, plus interest. The parties agree that the sole issue is whether, as a matter of law, the plaintiffs are entitled to deduct the expenses. If they are, then they are also entitled to summary judgment; if they are not, then the defendant is entitled to summary judgment.

In McDonald v. Commissioner, 1944, 323 U.S. 57, the Supreme Court held that campaign expenditures incurred by a state court judge, in seeking

election, were not deductible under the predecessor of Section 162 (§23(a) (1), Internal Revenue Code of 1939), or under the predecessor of Section 212 (§23(a) (2) of the 1939 Code). The court found "the performance by petitioner of his judicial office constituted carrying on of a 'trade or business' within the terms of Section 23 of the Internal Revenue Code," 323 U.S., at 59, but nevertheless concluded that campaign expenses were not deductible:

He was therefore entitled to deduct from his gross income all the 'ordinary and necessary expenses' paid during 1939 in carrying on that 'trade or business'. He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge for the next ten years. 323 U.S., at 59-60.

The Court of Appeals for the Fifth Circuit, as well as several other circuits, have since uniformly applied McDonald, to deny the deduction of campaign expenses in similar circumstances. Nichols v. Commissioner, 5 Cir. 1975, 511 F.2d 618; Maness v. United States, 5 Cir., 1966, 367 F.2d 357; Campbell v. Davenport, 5 Cir., 1966, 362 F.2d 624;

Levy v. United States, Ct. Cl. 1976, 535 F.2d 47; Shoyer v. United States, 3 Cir., 1961, 290 F.2d 817; Carey v. Commissioner, 1971, 56 T.C. 477, aff'd, C.A. 4, 1972, 460 F.2d 1259.

The plaintiff argues that times and attitudes have changed, and that the Internal Revenue Code should be reinterpreted to adjust tax deductions to contemporary reality. Bound as a lower federal court to adhere to the decisions of the United States Supreme Court, and finding no later indication in its decisions that the precedent of McDonald has been sapped, this court must refer the argument for bringing the Internal Revenue Code up to date to the Congress.

For these reasons, plaintiff is not entitled to deduct the campaign expenses in issue. Accordingly, the plaintiff's motion for summary judgment is DENIED, and the defendant's motion for summary judgment is GRANTED.

s/ Alvin B. Rubin
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
March 25, 1977

Date of Entry: Mar 28, 1977.
